No. 13,545

IN THE

United States Court of Appeals

For the Ninth Circuit

R. W. MEYER, LIMITED,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

Appeal from the Supreme Court of the Territory of Hawaii.

APPELLANT'S REPLY BRIEF.

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The Appellant respectfully submits:

The answering brief of the Appellee does not attempt to follow, in orderly sequence of reply, argument to the Appellant's opening brief, nor to answer in any fashion the material points of law and the cited evidence as they appear therein. Most of the matter set out in the answering brief is original matter alleging facts not found in the record or submitted to the Supreme Court of Hawaii, denying, without citation of record, the cited testimony of the witnesses, or urging, on appeal, that the findings of the lower Court are final and binding as to the law and the facts.

Replying to matters found in the answering brief as they are set out, Appellant shows (pages in Appellee's brief are shown as (AB):

JURISDICTIONAL STATEMENT. (AB 1.)

It is shown by the record and by the statement of Appellee in its brief that the value of the land involved or the damages sought is in excess of $5,000.00. While jurisdiction may not be conferred by agreement, facts constituting the jurisdictional qualification, may appear by record, affidavit, or by stipulation. The burden of sustaining the jurisdiction of this Court is met by reference to the record showspecifically the value claimed by the parties. The record shows on its face that the second cause of action is dependent on the decision of this appeal, since there can be no damage to occupancy, if there is no right of title.

STATEMENT OF THE CASE. (AB 4.)

ANSWERING "THE TRIAL COURT'S PRIMARY ERROR WAS IN HOLDING THAT THE GOVERNMENT SURVEY, EVEN THOUGH INCORPORATED IN THE PATENT, CONSTITUTED ONLY AN INCONCLUSIVE OPINION AS TO WHERE THE LINE SHOULD BE".

The trial Court did not so hold. The government survey in the patent is the description. The issue before the trial Court was the location of the described line on the ground. It has been the contention of Appellee throughout this case that the "map", so

called, attached to the patent was the "survey", although on numerous occasions the Appellee differentiates between the "map" and "survey". There is no evidence that the "map" so attached represented any location work by any surveyor. It is positively shown that this sketch of the disputed boundary was "sketched in", was a "Meander line", was never intended to fix the boundary, but as Newton says, "It (the title) follows the monument". Further, the sketch was not on any government map at the time of the sale, but was added to those maps without survey afterwards. It is settled law that, in the absence of fraud, the description of a natural monument is superior to any plat or sketch unless it is shown affirmatively that the parties intended the sketch to control; that a meander line does not fix a boundary. The intention of the parties as shown by the correspondence, by the occupancy of the land to the falls by Meyer, and by the dispute over water rights by the leper settlement officials, shown in Mauritz' affidavit, was to convey the whole of the lele to the ancient boundary known to the parties as the "head of Waihanau valley" and shown in the surveyor's field book to be along the big falls.

APPELLEE'S STATEMENT THAT THE SKETCH WAS "INCORPORATED IN THE PATENT" IS WITHOUT JUSTIFICATION.

Numerous cases, cited in the opening brief, show that it was the practice in Hawaii, as in the federal land office, when land was purchased, to attach a

sketch for the purpose, not of fixing boundaries, but to show the general location and shape of the land, and to determine the amount of acreage purchased. There is no showing in this case that there was any other purpose in attaching a sketch, without reference to it in the description, to this patent.

QUESTIONS INVOLVED. (AB 7.)

ANSWERING "DID THE SUPREME COURT OF HAWAII COMMIT REVERSIBLE ERROR BY HOLDING THAT THE GRANT IS CLEAR, CERTAIN AND UNAMBIGUOUS, REQUIRING A LOCATION WHICH EXCLUDES THE DISPUTED AREA"?

Here again, Appellee and the Supreme Court of Hawaii erroneously adopt the sketch as part of the description, and, having so adopted the sketch without supporting evidence of intent to control, or that the sketch represented a traversed, fixed boundary, and in spite of a definite ruling and proof to the contrary, hold that the sketch is all controlling, fixing the boundary contrary to the proven location of the described monument, and in total disregard of the undenied intent of the parties that the land held by Meyer, the whole of the lele, should be conveyed.

The Supreme Court is right in saying that the grant is clear, certain and unambiguous, as held by the trial Court. It is in error in rejecting the factual testimony, uncontradicted, as to the location of that line on the ground. It is further in error in adopting opinion testimony by persons unfamiliar with the natural boundary described, locating on the ground

a boundary so described. The Supreme Court of Hawaii is also in error, in ruling that the Waihanau valley, the monument described, extends to a place above the boundary shown by witnesses, without any factual testimony to support its position.

The ruling by the Supreme Court in connection with the above finding, that the testimony of persons familiar with the ground, born and raised on the land, as to the location of Waihanau valley, below the big falls, and as to the boundaries of Waihanau valley as known from ancient times, is incompetent, is contrary to all known decisions requiring ground locations to be proved by such testimony. The decisions, all of them, hold that the grant must be tied to the land by such testimony and that surveyors may be used either to trace the footsteps of the original survey (in this case there were no such footsteps), or to identify the location of lost monuments which have been located mathematically or by technical means comprehensible to the profession. Their opinion otherwise as to facts of factual locations, the location of natural monuments, or artificial monuments not so identified or located, is immaterial.

THERE IS NO STATUTORY RULE OF EVIDENCE IN HAWAII DIFFERING FROM THE FEDERAL RULES OF PROOF OF BOUNDARIES. (AB 8.)

The Supreme Court of Hawaii, in its ruling, departed from the established law of Hawaii, fixed by the decisions of the Supreme Court of Hawaii before

annexation and cited in the opening brief adopting the principles of the United States Supreme Court and the decisions thereof to the effect that (a) in a patent a natural monument takes precedence over map and sketch locations; (b) that all boundary lines must be tied to the grant by oral factual testimony; (c) that the opinions of surveyors may not be taken except for the technical determination of mathematically fixed locations; (d) that the existence in any office of the government of a map is not proof of a boundary; (e) that the field notes of a surveyor are evidence, not only of what he did in connection with a survey, but what he did not do; (f) that the field notes of a surveyor are part of a map prepared in accordance with the survey, and where the field notes and the map differ the field notes control. In this case, the definite location in the field book, on page 112, of the big falls by triangulation, and the location of the boundary line of Kahanui as passing through those falls, above the location shown on the sketch as being Waihanau valley, must control any map or sketch, plat or diagram on which those landmarks do not appear in the ground location of the described boundary.

ARGUMENT. (AB 9.)

APPELLEE ASSIGNS AS ERROR THE DECISION OF THE TRIAL JUDGE THAT IT WAS THE INTENT OF THE PARTIES TO CONVEY ACCORDING TO THE ANCIENT BOUNDARIES. (AB 13.)

The intent of the parties became material only if there was an ambiguity in the description. It also was an obligation of the Courts to so construe the grant, if possible, to effectuate the intent of the parties. We are concerned here with only the application of that ruling to the present case in view of the testimony. The whole of the correspondence shows this intent. The boundary is described as being the head of Waihanau valley, which was the ancient boundary by all of the testimony. In determining what was the ground location of the described boundary, it was important, first, to determine whether the boundary was capable of ground location by parol testimony; second, in case of a divergence in locations to determine whether the parties were familiar with that location and whether their intent coincided with the proven ground line. It cannot be understood why the Supreme Court of Hawaii said that the testimony of the witnesses, familiar with the ground, which placed the boundary from landmark to landmark, accurately following the line of the surveyor shown on Appellant's map, but identifying the line on the ground in absolute certainty, constitutes a variation of the description because the patent does not contain the step by step landmarks but describes the land as following the meander of the head of the valley. It

was the "head of the valley" which the witnesses were pointing out, not the legal implications of the use of the name.

The only evidence or testimony as to the location of the "head of Waihanau valley" is in the statements of Appellant's witnesses. The opinions of Newton, Howell, Jorgensen and Carson were all, by their statements, opinions as to where the line of the sketch would lie if placed upon the ground. Not one of these witnesses had any factual knowledge of the "head of Waihanau valley" or pretended any knowledge of local land boundaries. None of their testimony, and there is no other, may be accepted to tie the grant to the land, or the land to the grant. Without that testimony there is not one iota of proof that the boundary claimed by the government and fixed by the Supreme Court of Hawaii exists other than in desire and imagination.

ANSWERING (AB 14) "IN NO PLACE DID THE WITNESS SAY THAT THE LAND WAS MAPPED AFTER THE GRANT OR THAT THE ORIGINAL MAP WAS CHANGED IN ANY MATERIAL RESPECT".

The witness Newton said the sketch of Kahanui was added to the government map after the grant (R. 321) the maps on record were all produced from the one survey by Monsarrat and are all copies of the original. with no record as to what was on the original at the time of the grant. The maps are progressive maps with matter added from time to time with no record as to

who added, or on what authority the addition was made. The sketch boundary of the land of Kahanui shown on the government maps was certainly added sometime after the original was drawn. At the time of the grant Monsarrat had never been on the disputed boundary.

THE WHOLE CASE OF APPELLEE IS BASED ON NEWTON.

Newton was the government's prime witness. He was the custodian of the records produced at the trial, and it was his authentication of those records that made them admissible. It is his reproduction of the sketch line which is adopted by the government, although he knows little of that land, knew that he was not following Monsarrat's footsteps but was making a line of his own, and looked for no monuments because he knew there were none. The genuine character of the maps, sketches and records as being documents known to the parties to the grant and controlling the boundary line as it was known at the time of the patent is of the essence of the law of this case. If the maps produced cannot be shown to be original documents, but "progressive maps" of the type discussed in the various cases, Hawaiian and federal, cited in the opening brief, they certainly cannot be acceptable as proving the location of a line known to persons acting with mutual intent prior to their existence.

CONTOUR LINES DO NOT PROVE BOUNDARY LOCATIONS.

Much is made by the Appellee of the alleged contour of the upper valley as determining the boundary. Contour may be a criterion where there is a dispute as to a definite known boundary lost to the knowledge of the present generation. It has no bearing upon the location of a named boundary well known to numerous witnesses. Like intent, area, occupancy, and other vague indications of ownership which may be considered when other evidence directly to the point is unavailable. However, natural boundary lines of savage and primitive peoples such as the Hawaiians when these lands were bounded, tend to be those of impassable or defensible barriers. The line of the big falls is such that even today it bars the lepers from uncontaminated land. It is truly a line of the continual impassable palis surrounding the lower land. The terrain of the upper valley, on the contrary, is bounded only by a visual barrier, where the valley turns, and constitutes no such impediment to travel as to have been a barrier to the native mountaineers.

Box canyons are not unknown in the west. Wherever there are steep mountains there are gulches that end in cliffs. Most of these are known by name and bounded as box canyons by the cliff regardless of the extent of the watershed above or the height of the hills on either side. Such a box canyon is Waihanau, the name meaning "the water erupts" or the "birth of waters"; such would be the appearance of the big falls from below when the water was in flood.

CONCLUSION.

This is a boundary case. The origin of the dispute between the parties is plain. As Appellee explains, the government land office gave Jorgensen a map of the boundaries of the government land which had the meander line then indicated as a surveyed line, which was false. On the faith of this map, the government engineers laid out and constructed a waterworks at an expense of nearly a million dollars with its intake above the falls. At that time they were in negotiation with the Meyers to buy the land occupied by the Meyers and the Meyers were asked to and did remove their cattle from the land down to the big falls. After the tunnel was built, the claim was first made, in the condemnation suit of 1929, that the Meyers did not own the tunnel site, and offers to pay for the Meyer lands as excluding this portion were the cause of the breakdown of negotiations and the necessity for that condemnation action.

Since that time several actions have been started to collect rentals from the government for the use of the land, as recited by Appellee in the answering brief. These actions were thwarted by the jurisdictional rule that there can be no implied contract where the government claims to act by right, and it took an action by the legislature to authorize specifically the recovery of such claims in this cause in the second cause of action.

Actually, the issue before the Court narrows down to these questions: Where a clear, certain, unambig-

uous description is written into a description of land, naming a natural boundary, a monument known to all parties by name and location, and the land is sold at public auction according to the description given, can the fact that a sketch, without any of the indicia of a map, direction, distance, topography, scale, override the description and change the location of the boundary to a reproduction of the sketch line on the ground? Can the opinion testimony of surveyors without information as to the location or name of natural boundaries, be used to fix a line on the ground not determined by mathematics of technical traversed survey?

The judgment on appeal of the Supreme Court of Hawaii should be reversed and the decree of the trial Court ordered sustained.

Dated, Eugene, Oregon,
August 5, 1953.

Respectfully submitted,
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SAMUEL SHAPIRO,
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